

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company)	
)	00-0259
Petition for expedited approval of)	
implementation of a market-based)	
alternative tariff, to become effective on)	
or before May 1, 2000, pursuant to)	
Article IX and Section 16-112 of the)	
Public Utilities Act)	
)	(cons.)
Central Illinois Public Service Company)	
Union Electric Company)	
)	00-0395
Petition for approval of revisions to)	
market value tariff, Rider MV)	
)	
Illinois Power Company)	
)	00-0461
Proposed new rider MVI and)	
revisions to rider TC.)	

**VERIFIED JOINT MOTION OF COMMONWEALTH EDISON COMPANY AND
ILLINOIS POWER COMPANY TO STRIKE SURREBUTTAL TESTIMONY FILED BY
NEWENERGY MIDWEST, L.L.C. AND CENTRAL ILLINOIS LIGHT COMPANY**

Commonwealth Edison Company (“ComEd”) and Illinois Power Company (“IP”), pursuant to 83 Ill. Adm. Code § 200.190, jointly move to strike the surrebuttal testimony filed on behalf of NewEnergy Midwest, L.L.C. (“NewEnergy”) and Central Illinois Light Company (“CILCO”) in the above-captioned dockets. In support of this motion, ComEd and IP state as follows:

1. On July 21, 2000, the Hearing Examiner adopted a schedule proposed by the Commission Staff at the July 12, 2000 prehearing conference, and set forth in the Illinois Industrial Energy Consumers’ (“IIEC”) reply comments filed July 19, 2000, for use in this

proceeding. At the July 12, 2000 prehearing conference, Staff proposed that “surrebuttal of the companies” be submitted on September 22, 2000. *See* July 12, 2000 Transcript, at 22. Counsel for ComEd and Staff specifically explained that “[r]ebuttal is all parties, and surrebuttal is companies” that had filed the market index tariff proposals. *Id.* at 23. Moreover, IIEC’s summary of Staff’s proposal clearly stated “Rebuttal testimony by all parties September 12” and “Rebuttal testimony by the Company September 22.” IIEC’s Reply Comments With Respect to Scheduling Proposals, at 1. Since the filing of NewEnergy’s and CILCO’s surrebuttal testimony, Staff has reaffirmed that the “company” surrebuttal that was contemplated in its proposed schedule was solely that of ComEd, IP and Ameren. ComEd and IP would not have accepted Staff’s proposed schedule had it not provided them with the opportunity to respond to the final rebuttal testimony filed by others.

2. The Commission rules, which are designed to ensure an orderly proceeding, provide that a petitioner has the right to “open and close” the proceeding. This is because the petitioner bears the burden of proof. 83 Ill. Admin. Code § 200.570. Accordingly, as the petitioners, ComEd, IP and Ameren have the right to surrebuttal. Other parties do not.

3. The schedule proposed by Staff and approved by the Hearing Examiner was consistent with the rights of ComEd, IP and Ameren under the Commission’s rules. On September 22, 2000, in contravention of the adopted schedule, and without seeking the leave of the Hearing Examiner or the parties, NewEnergy and CILCO filed surrebuttal testimony in this proceeding. In fact, the surrebuttal testimony filed by NewEnergy is twenty-five pages long, making it NewEnergy’s longest piece of testimony in this proceeding. NewEnergy also attached to its surrebuttal testimony three pages of exhibits it had not previously disclosed in testimony or through discovery. Much of the new testimony and exhibits, such as its explanations of prior

statements and inclusion of additional calculations, could have been presented in rebuttal testimony.

4. Where, as here, parties have violated the scheduling order set in this proceeding, striking the testimony is appropriate. Indeed, a failure to strike the testimony in such circumstances would encourage abuse of the Commission's process. The Commission should not encourage parties to violate established schedules in order to obtain a tactical advantage. Moreover, accepting into the record the surrebuttal testimony of parties that do not bear the burden of proof will violate ComEd's, IP's and Ameren's rights to close the submission of proofs.

5. The Commission's rules specifically provide that "parties which do not act diligently and in good faith shall be treated in such a manner as to negate any disadvantage or prejudice experienced by other parties." 83 Ill. Admin. Code § 200.25(b). In these circumstances, not striking the surrebuttal testimony by NewEnergy and CILCO would prejudice ComEd and IP by denying them—the parties with the burden of proof—an adequate opportunity to respond to this testimony. This filing is also unfair to the other parties who obeyed the scheduling order. Moreover, it would be burdensome for petitioners to respond to the arguments of NewEnergy and CILCO at this eleventh hour, especially considering the truncated schedule in place in this proceeding.

WHEREFORE, ComEd and IP respectfully request that the Hearing Examiner grant this motion to strike the rebuttal testimony filed on behalf of NewEnergy and CILCO.

Respectfully Submitted,

One of the Attorneys for
Commonwealth Edison Company

One of the Attorneys for
Illinois Power Company

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Dated: September 26, 2000

STATE OF ILLINOIS)
)
) SS.
COUNTY OF COOK)

VERIFICATION

My name is Courtney A. Rosen. I am an attorney at Sidley & Austin working on behalf of Commonwealth Edison Company. I have reviewed the foregoing Verified Joint Motion of Commonwealth Edison Company and Illinois Power Company to Strike Surrebuttal Testimony Filed by NewEnergy Midwest, L.L.C. and Central Illinois Light Company. I am familiar with the matters stated therein, and the factual statements contained therein are true and correct to the best of my knowledge and belief.

Courtney A. Rosen

SUBSCRIBED AND SWORN
before me this __ day
of September, 2000.

NOTARY PUBLIC

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NOTICE OF FILING

TO: SERVICE LIST

PLEASE TAKE NOTICE that on this date we have electronically filed with the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62706 a Verified Joint Motion of Commonwealth Edison Company and Illinois Power Company to Strike Surrebuttal Testimony Filed by NewEnergy Midwest, L.L.C. and Central Illinois Light Company in the above captioned matter.

DATED this 26th day of September, 2000.

One of the Attorneys for
Commonwealth Edison Company

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CERTIFICATE OF SERVICE

I, Courtney A. Rosen, an attorney, certify that I caused copies of the attached Verified Joint Motion of Commonwealth Edison Company and Illinois Power Company to Strike Surrebuttal Testimony Filed by NewEnergy Midwest, L.L.C. and Central Illinois Light Company to be served on each of the interested parties by email and Federal Express, this 26th day of September, 2000.

Courtney A. Rosen